No. 83983-2

THE SUPREME COURT

STATE OF WASHINGTON

JEFFERY W. NICCUM, a married man,

Respondent,

v.

RYAN L. ENQUIST, individually and the marital community composed of he and his wife, if any,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On March 21, 2010, The Supreme Court of Washington granted Petitioner, Ryan L. Enquist's Petition for Review of the decision of the Court of Appeals No. 27504-3-III. Petitioner requested an extension of time to file a supplemental brief with regard to this matter. The Supreme Court Deputy Clerk, Susan L. Carlson, granted such motion for extension of time to file supplemental briefs to both parties requiring that they be filed not later than May 7, 2010.

II. ISSUES ADDRESSED IN THE SUPPLEMENTAL BRIEF

(A) Does the Court of Appeal decision by Division III conflict with Division I's decision in *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003), because Division III failed to compare comparables when it concluded Mr. Enquist did not improve his position on the trial de novo?

(B) Does Division III's decision undermine the purpose of the mandatory arbitration system and create confusion by permitting a party's offer of compromise to alter the nature of the arbitration award?

III. ARGUMENT

(A) Division III's decision does not conflict with Division I's decision in *Tran v. Yu*, 118, Wn. App. 607, 75 P.3d 970 (2003).

Despite Petitioner's contention that the decision in Niccum v. Ryan, Court of Appeals No. 27504-3-III conflicts with *Tran v. Yu*, it is clear that no conflict is presented and the decisions are in harmony with one another.

RCW 4.84 entitled Costs provides:

> **§ 4.84.010. Costs allowed to prevailing party - Defined – Compensation of attorneys**
> The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:
> (1) Filing fees;
> (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
> (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.
> (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration,

the recoverable cost is the amount actually charged and incurred in effecting service;
(3) Fees for service by publication;
(4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax
records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
(6) Statutory attorney and witness fees; and
(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 7.06 entitled Mandatory Arbitration of Civil Actions provides:

Chapter 7.06. Mandatory arbitration of civil actions
Current through 2009 Legislative *Session*
§ 7.06.050. Decision and award - Appeals - Trial - Judgment
(1) Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on

the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.
(a) Up to thirty days prior to the actual date of a trial de novo, a nonappealing party may serve upon the appealing party a written offer of compromise.
(b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.
(c) A postarbitration offer of compromise shall not be filed or communicated to the court or the trier of fact until after judgment on the trial de novo, at which time a copy of the offer of compromise shall be filed for purposes of determining whether the party who appealed the arbitrator's award has failed to improve that party's position on the trial de novo, pursuant to MAR 7.3.
(2) If no appeal has been filed at the expiration of twenty days following filing of the arbitrator's decision and award, a judgment shall be entered and may be presented to the court by any party, on notice, which judgment when entered shall have the same force and effect as judgments in civil actions.

MAR 6.3 entitled "Judgment on Award" provides:

If within 20 days after the award is filed no party has sought a trial de novo under rule 7.1, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final

> judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.
> MAR 6.4 entitled "Witness Fees and Costs" provides:
>
> Witness fees and other costs provided for by statute or court rule in superior court proceedings shall be payable upon entry of judgment in the same manner as if the hearing were held in court.

Had petitioner not appealed the mandatory arbitration award such witness fees and costs would have been allowed by superior court and in addition to the arbitration award Mr. Niccum would have been entitled to recover the costs awarded. However, because such award was appealed, the opportunity for entry of an award for costs was not available to Mr. Niccum. Nonetheless, Mr. Niccum is not required to waive such costs in order to make an appropriate offer of compromise.

To avoid any uncertainty with regard to the amounts that Mr. Niccum was including in the last offer of compromise the provision was provided that the offer of compromise included those costs which were properly awardable after the arbitration hearing had there not been an appeal.

Division III of the Court of Appeals properly excluded those costs in determining whether Mr. Enquist had improved his position as a result of the appeal from the mandatory arbitration award. Thus, Division III did in fact compare comparables to comparables determining that Mr. Enquist had not improved his position.

(B) Division III's decision does not undermine the purposes of the mandatory arbitration system by permitting a party's offer of compromise to indicate that such offer does not include a waiver of allowable costs.

Mr. Niccum asked for nothing that he was not entitled to. He did not ask for costs incurred after the arbitration and necessary for trial caused by Mr. Enquist's appeal of the arbitrator's award.

Mr. Niccum agrees that the Washington legislature adopted mandatory arbitration to reduce congestion and delays in the court system. *Nevers v. Fireside, Inc.*, 133 Wn. 2d. 804, 815, 947 P2d. 721 (1997). In Enquist's petition for review to the State Supreme Court he states at pages 11 and 12:

> Although an offer of compromise serves the purpose of establishing a new threshold for determining whether the requesting party improves his position at trial, the compromise offer remains at its essence, a settlement offer. If the defendant accepts the offer, he pays the agreed amount to plaintiff. After payment of the settlement amount, plaintiff has no recourse to seek costs. Only a "prevailing party" is entitled to an award of costs. RCW 4.84.010. Where an offer of compromise is offered and accepted, both parties agree to compromise for a settlement and neither is entitled to statutory costs. Further, no judgment is entered after a settlement agreement is reached. RCW 4.84.010 is clear that certain costs "shall be allowed to the prevailing party upon the judgment." (Emphasis added.)
>
> In light of these basic tenets of case settlement, plaintiff's addition of language indicating that the offer was inclusive of costs and statutory attorney fees is entirely irrelevant. Plaintiff's offer of compromise was an offer for global settlement of the case, regardless of whether he allocated certain sums under certain headings. If Mr. Enquist had accepted either offer, the case would have ended. Plaintiff would have had no recourse to seek the costs and attorney fees because under RCW 4.84.010 he was not a prevailing party. Divisions III's decision undermines the central purposes behind the mandatory arbitration system. This Court should accept review to address this important issue.

Mr. Niccum refused to waive the costs that he was entitled to and made it clear in his offer of compromise (offer of settlement) that he was not waiving such costs.

Petitioner claims that in order to make an offer of compromise a prevailing party must give up their right to statutory costs. Petitioner rightly argues that no offer of compromise would be considered if costs would also be awarded in addition to the amount of the offer of compromise. Mr. Niccum, recognized petitioner's position in his third offer of compromise, making it clear that such acceptance of the offer of compromise must allow statutory costs, in addition to the damages awarded. To suggest that the core purpose of mandatory arbitration is thwarted by a party asking what they are entitled to is improper and does not make sense. The petitioner never entered into any settlement negotiations despite three offers of compromise by Mr. Niccum. This shows that the petitioner had no interest in compromising this claim or settling it unless Mr. Niccum waived the costs he was entitled to. The position of the petitioner is that an offer of compromise is an offer of settlement. Petitioner refused to engage in any settlement negotiations and now argues that the purpose of mandatory arbitration would be defeated if costs are allowed.

IV. CONCLUSION

Division III's decision in this case is entirely consistent with the offer of compromise provisions. The offer of compromise obviously is intended to promote settlement, reduce court congestion and delays and expense with regard to smaller cases. Petitioner believes, and respondent does as well, that the purpose of the offer of compromise is in effect a settlement offer. The petitioner believes that acceptance of the offer of compromise terminates the case and that the respondent would lose any right to recover his otherwise allowable court costs.

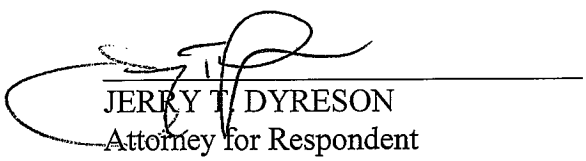
To protect against such result the offer of compromise in this case was couched in terms that included the court costs that Mr. Niccum was entitled to as a prevailing party in the arbitration. Division III recognized the necessity of including such costs in the offer of compromise but also recognized that whether the petitioner had improved their position depended upon comparing the damages awarded by the arbitrator with those awarded by the jury. Therefore, they properly deducted from the

offer of compromise those amounts which were properly allowable as costs.

This ruling is consistent with the prior case law and in fact promotes settlement of these smaller cases, avoiding unnecessary expense, delay and court congestion. Public policy strongly favors such a construction of the offer of compromise statute. Petitioner's claimed concern with the adverse effect that this ruling would have on settlement of cases flies in the face of their steadfast refusal to acknowledge any of the offers of compromise made by the petitioner.

For these reasons the decision of the Court of Appeals should be upheld.

Respectfully submitted,



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